ANTERO HARAPAN SDN BHD v. RESTU TEGUH SDN BHD

HIGH COURT MALAYA, IPOH
ANSELM CHARLES FERNANDIS JC
[COMPANIES WINDING-UP NO: 28NCC-60-10-2014]
30 NOVEMBER 2017

COMPANY LAW: *Winding up – Setting aside of agreement – Petitioner notified liquidator of intention to purchase land – Petitioner agreed to advance required amount to acquire land from State Government provided liquidator sold land to it – Contributories objected and required liquidator to accept advance as loan from petitioner to acquire land and sell it by tender or auction – Whether agreement entered by petitioner and liquidator valid – Whether ought to be set aside – Whether land alienated with condition to be utilised for residential or commercial purpose – Whether liquidator was acting properly and impartially in dealing with land – Companies Act 1965, ss. 236 & 237 – National Land Code, s. 78(3)*

The respondent instituted a civil suit against Majlis Daerah Tengah ('MDT'), Pengarah Tanah dan Galian Negeri Perak ('PTG') and Kerajaan Negeri Perak ('KNP') for damages for breach of a joint venture agreement ('the JVA'). However, it was wound up before the suit could be litigated and a liquidator was appointed. A consent judgment was entered between the respondent and MDT and KNP where it was agreed that KNP would transfer a property ('the land') to the respondent upon payment of RM3.5 million together with RM596,047 ('the consent judgment'). The liquidator forwarded a copy of the consent judgment to the contributories and the petitioner on 16 May 2016 and they were invited to pay RM3.5 million together with RM596,047. The contributories were given first priority to make the payments and time of essence and no extension of time would be given. The contributories informed that they had made arrangements for the payments and the petitioner informed the liquidator that, in the event the contributories were unable to provide the sum, it was willing to purchase the land by way of a private treaty. The petitioner then forwarded a banker's cheque for the sum of RM3.5 million and notified its intention to purchase the said land. The liquidator obtained a valuation report which stated that the market value of the said land was RM17.3 million. The petitioner agreed to advance the required amount to acquire the land from the KNP provided the liquidator sold the land to it for a consideration of RM17.3 million. The contributories objected and required the liquidator to accept the advance as a loan from the petitioner to acquire the land and sell it by tender or auction. This prompted the liquidator to make an application under s. 237(3) of the Companies Act 1965 ('the CA') to seek directions of the court on how to proceed as the respondent had no other asset. At the High Court, the

direction was that, in the event the PTG did not give the extension of time as sought on the settlement of the balance purchase price and premium in accordance with the consent judgment on or before 26 October 2016, the liquidator was at liberty to take appropriate steps to secure and sell the land ('the order'). On 27 October 2016, the respondent paid the balance purchase price and the premium through advances made by the petitioner. The contributory sought the liquidator to appeal against the state authority refusing an extension of time. However, the respondent replied that the consent judgment only accorded the liberty to apply for an extension for time to settle the above-mentioned payments. The State Authority rejected such application for an extension of time. The respondent then entered into an agreement ('the agreement') with the petitioner for the sale of the said land. The contributory lodged a private caveat to prevent the sale of the land but the caveat was removed by the High Court. The contributory filed the present action to set aside the agreement and to declare it as void ('encl. 86'). In support of his application, the contributory submitted that (i) the respondent had no *locus standi* to sell the land as alienation took place on 28 December 2016 while the agreement was dated 21 November 2016; (ii) the liquidator had committed equitable fraud as the said land was sold at an undervalue to the petitioner; (iii) the said land was alienated as commercial land and not residential; and (iv) the petitioner and the liquidator had effected, transferred and registered the said land in favour of the petitioner on 12 May 2017 with the intention of defeating the application in encl. 86. The issues that arose for the court's determination were (i) whether the agreement was valid in light of s. 78(3) of the National Land Code ('the NLC'); (ii) whether the land was alienated with the condition that it was to be utilised for residential or commercial purpose; and (iii) whether the liquidator was acting properly and impartially in dealing with the land.

Held (dismissing application):

(1) Section 78(3) of the NLC clearly states that alienation could only take place upon registration of a register document of title. This is the position notwithstanding that its alienation has been approved by the State Authority, 'the land shall remain State land until that time'. In short, approval alone does not equate with alienation and title, equitable or otherwise. There must be registration of title in accordance with the NLC. From the reading of s. 78(3) NLC, its rationale is to ensure that notwithstanding prior approval by the State Authority, the alienation process is only completed when final registration takes place in accordance with s. 78(1) or (2) of the NLC. Thus, the scope of s. 78(3) of the NLC is wide enough to cater for any eventualities that might take place between the time of the approval to the time of registration of the title. (para 18)

(2) The consent judgment was in effect a contract between the parties which was superadded by the command of the court. In this respect, the liquidator of the respondent had the *locus standi* to enter into the agreement with the petitioner. This, in turn, gave legitimacy to the agreement itself. This was so despite the fact that registration had not taken place as yet. (para 30)

(3) The question as to the use of the said land was put to rest on the issuance of the document of title on 28 December 2016. At the heading 'Syarat-syarat Nyata', it was expressly stated as 'Bangunan Kediaman'. Even in the contributory's own affidavit, a document entitled 'Cacatan Charian Persendirian' stated the land use as 'Bangunan Kediaman'. This supported the contention of the liquidator and respondent all along that the said land was alienated for residential purposes only and that their valuation was done on that basis. The condition was also consonant with the terms of the consent judgment. (para 41)

(4) The said land would not be transferred to the respondent otherwise and the respondent would have lost the only asset it had. This would not be a loss to the respondent alone but to the other creditors and contributory of the respondent as well. It would also be unreasonable for the liquidator not to enter into the agreement as the full purchase price had been paid by the petitioner despite the fact that the contributory being given all the opportunity to do so. The liquidator was merely complying with the court order in securing the said land and selling it. The court had granted the liquidator's application for directions and was thus merely following the direction given by the court as the State Authority had refused the extension of time. The propriety or correctness of the liquidator's and petitioner's conduct was further exemplified by the contributory not having appealed against the said order. (paras 42, 48 & 49)

(5) The contributory did not timeously file court proceedings to sustain the said caveat from the time it was lodged on 13 January 2017, to the time it was removed on 6 April 2017, which was approximately three months. Nothing was done in the form of court proceedings during that time despite strong allegations of *mala fide* conduct on the part of the liquidator in the contributory's statutory declaration made for the purpose of lodging the caveat. This inaction on the part of the contributory left serious doubts as to the intention of the contributory in bringing this action. (para 53)

Case(s) referred to:

Antero Harapan Sdn Bhd v. Restu Teguh Sdn Bhd [2017] 6 CLJ 61 HC ***(refd)***

Dr Ti Teow Siew & Ors. v. Pendaftar Geran-Geran Tanah Negeri Selangor [1981] CLJ 134A; [1981] CLJ (Rep) 142 HC ***(refd)***

Halimah Abdul Rahman v. Fatimah Abdullah [1976] 1 LNS 38 FC ***(refd)***

Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd [2001] 4 CLJ 549 CA ***(foll)***

A *Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd [1987] 2 CLJ 290; [1987] CLJ (Rep) 160 SC* ***(refd)***

North East Plantations Sdn Bhd lwn. Pentadbir Tanah Daerah Dungun & Satu Lagi [2011] 4 CLJ 729 FC ***(refd)***

North Plaza Sdn Bhd v. Equiticorp Holdings Ltd & Ors And Other Appeals [2013] 3 CLJ 1101 FC ***(refd)***

B *Pembinaan Batu Jaya Sdn Bhd v. Pengarah Tanah Dan Galian Selangor & Anor [2013] 10 CLJ 570 HC* ***(refd)***

Pembinaan Batu Jaya Sdn Bhd v. Pengarah Tanah Dan Galian, Selangor & Anor [2016] 5 CLJ 250 CA ***(refd)***

Registrar Of Titles, Johore v. Temenggong Securities Ltd [1976] 1 LNS 135 ***(refd)***

C *Syarikat Syed Kechik Holdings Sdn Bhd & Ors v. Syed Gamal Syed Kechik [2012] 1 LNS 1074 HC* ***(refd)***

Tan Geok Lan v. La Kuan [2004] 2 CLJ 301 FC ***(refd)***

Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849 FC ***(refd)***

Legislation referred to:

D Companies Act 1965, s. 237(3)
National Land Code, s. 78(1), (2), (3)

Other source(s) referred to:

Malaysian Civil Procedure, 2015 edn, p 566

For the petitioner - Leong Sai Wah; M/s CK Leong & Co

E *For the respondent - Ganesan Karuppannan & Subashini Ramakrishnan; M/s Ganesan & Irmohizam*

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Reported by Najib Tamby

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JUDGMENT

Anselm Charles Fernandis JC:

Introduction

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[1] This is an application by a contributory of the respondent company, one Hui Hoon Chun for the following orders:

(i) that all actions, proceedings, transactions, transfers and or presentation in relation to said land held under H.S.(D) 18602 No. Lot. PT 28416 Mukim Bota, Daerah Perak Tengah, Negeri Perak (the said land) arising from the sale and purchase agreement (the agreement) dated 21 November 2016 made between the petitioner company and the respondent company be stayed pending the hearing and disposal of this application; and

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(ii) that the agreement be set aside and all actions, proceedings, transactions, transfer and or presentation in relation to land held under H.S.(D) 18602 No. Lot. PT 28416 Mukim Bota, Daerah Perak Tengah, Negeri Perak arising from thereof be set aside and/or declared void.

Background Facts

[2] The facts of the case are important so as to appreciate the actions of the parties especially that of the petitioner and the liquidator in entering into the agreement. The background facts of this case, as gathered from the various affidavits filed by the parties can be summarised as follows:

(a) The respondent was wound up on 9 February 2015 and one Tam Kok Meng was appointed as the liquidator. Before being wound up the respondent had instituted Civil Suit No. 22NCVC-93-09/2014 in the High Court at Ipoh against Majlis Daerah Perak Tengah, Pengarah Tanah dan Galian Negeri Perak and Kerajaan Negeri Perak for breach of a joint-venture agreement in respect of the said land;

(b) Following to the appointment of the liquidator, the contributory together with the liquidator of the respondent held discussions with the State Government of Perak regarding a settlement proposal in respect of the pending High Court Civil Suit No. 22NCVC-93-09-2014. Thereafter, the respondent's solicitors *vide* an email on 6 May 2016 also extended the draft consent judgment to the contributory's solicitors;

(c) On 9 May 2016, a consent judgment was entered in Civil Suit No: 22NCVC-93-09-2014 between the respondent and Majlis Daerah Perak Tengah, Pengarah Tanah dan Galian Negeri Perak and Kerajaan Negeri Perak. The essential terms of the consent judgment were that:

   (a) within three months from the date of the Form 5A the respondent shall cause the payment of the total consideration of RM10.5 million together with an additional sum of RM596,047.00 being the premium and quit rent for the alienation and or transfer of the said land into the respondent's name;

   (b) a sum of RM7 million, as part purchase price, already been deposited by the respondent with the solicitors for Majlis Daerah Perak Tengah as stakeholders and the balance of RM3.5 million being the balance purchase price together with RM596,047 shall be paid within three months from the date of Form 5A;

(d) Pursuant to the consent judgment, the State Government agreed to transfer the said land to the respondent upon payment of RM3.5 million together with RM596,047 within three months of the receipt of the Form 5A. The Form 5A was received by the liquidator on 28 July 2016. The last day for making the payments due under the consent judgment was 27 October 2016.

(e) By letter dated 16 May 2016 the liquidator forwarded a copy of the said consent judgment to the contributories and the petitioner. The contributory and the petitioner were invited by the liquidator to pay the sums pursuant to the consent judgment, namely the sum of RM3.5 million together with RM596,047 and to be deposited with the liquidator on or before 15 July 2016. The letter expressly provided that the contributory was given the first priority to make the payments and that time was of the essence and no extension of time will be given.

(f) The contributory *vide* their (solicitors' letter dated 30 May 2016 informed that they had made arrangements for the said payments and would revert within 14 days from the date thereof. Nothing however came out of this.

(g) The petitioner by its letter dated 30 May 2016 informed the liquidator that in the event the contributory were unable to provide the sum of money required then it was willing to purchase the said land by way of a private treaty.

(h) The petitioner *vide* its letter dated 14 July 2016 forwarded a banker's cheque for the sum of RM3.5 million and notified its intention to purchase the said land as per the terms stated in its letter dated 30 May 2016.

(i) On 22 July 2016, the liquidator obtained a valuation report from Jordan Lee & Jaafar Sdn Bhd which stated that the market value of the said land was RM17.2 million. The petitioner then increased its original offer to RM17.3 million. The petitioner agreed to advance the required amount to acquire the said land from the State Government provided the liquidator sold the said land to it for a consideration of RM17.3 million. The contributories objected and required the liquidator to accept the advance as a loan from the petitioner to acquire the said land and sell it by tender or auction.

(j) This prompted the liquidator to make an application under s. 237(3) Companies Act 1965 (encl. 60) to seek directions of the court on how to proceed as the respondent had no other asset. This direction sought by the liquidator was whether he could accept the advance from the petitioner to acquire the said land and sell it to the petitioner for the consideration of RM17.3 million.

(k) In the order dated 24 October 2016 the direction was that in the event the Pejabat Pengarah Tanah dan Galian of State of Perak (the State Authority) did not give the extension of time as sought on the settlement of the balance purchase price and premium in accordance with the consent judgment dated 9 May 2016 on or before 26 October 2016 (the penultimate date for payment), the liquidator was at liberty to take

appropriate steps to "secure and sell the said land". The judgment of Komathy Suppiah JC is reported in *Antero Harapan Sdn Bhd v. Restu Teguh Sdn Bhd* [2017] 6 CLJ 61;

(l) The contributory solicitor's letter dated 25 October 2016 *inter alia* stated that in the event the approval of extension of time were to come after 26 October 2016 the directions given pursuant to the Order dated 24 October 2016 would not apply. The said letter purportedly enclosed, for the first time, a valuation report.

(m) The respondent's solicitors through a letter dated 26 October 2016 forwarded to the contributory solicitors a copy of the letter dated 26 October 2016 from the State Authority and further stated that the liquidator is at liberty to take appropriate steps to secure and sell the said land;

(n) On 27 October 2016, the respondent paid the balance purchase price and the premium through advances made by the petitioner;

(o) Again, the contributory solicitors through letter dated 28 October 2016 had asked the liquidator to appeal against the decision of the State Authority refusing an extension of time;

(p) The respondent's solicitors by a letter dated 31 October 2016 replied stating that the said consent judgment only accorded the liberty to apply for an extension of time to settle the above-mentioned payments. However, the State Authority through its letter dated 26 October 2016 had already rejected such application for an extension of time, hence the completion of the said payments ended on 27 October 2016. There is no provision for any further appeal.

(q) On 21 November 2016, the respondent entered into the agreement with the petitioner for the sale of the said land. The alienation of the said land took place on the 28 December 2016 and was effected upon the registration of a register document of title.

(r) On 12 January 2017, the contributory lodged a private caveat, apparently to prevent the sale of the said land from going through. However, upon an application made by the respondent *vide* Originating Summons No: AA-24NCVC-56-02/2017 in the High Court at Ipoh, an Order dated 6 April 2017 was granted to cancel and remove the said private caveat as the contributory had no caveatable interest;

(s) The contributory did not appeal against the order dated 6 April 2017;

(t) The respondent's solicitors *vide* letter dated 17 April 2017 had handed the original title to the said land together with the duly executed memorandum of transfer and the consent to transfer to the petitioner/purchaser's solicitors on 18 April 2017.

(u) The contributory filed this present action on 5 May 2017 seeking to set aside and declare the agreement void (encl. 86).

(v) The liquidator and the petitioner had effected transfer of the said land in favour of the petitioner on 12 May 2017.

The Contributory's Case

[3] The contributory asserts that the respondent had no *locus standi* to sell the said land. The alienation only took place on the 28 December 2016 whilst the sale and purchase agreement was dated 21 November 2016. Pursuant to the alienation a new title was issued to the said land. The contributory contends that since the sale and purchase took place before the alienation the said sale was void and should be set aside. He relied on s. 78(3) of the National Land Code (NLC) for this proposition. For ease of reference the said section is produced in full:

> How alienation is effected:
>
> (1) The alienation of State Land under final title shall be effected in accordance with the provisions of Chapter 3.
>
> (2) The alienation of State Land under qualified title shall be effected in accordance with the provisions of Chapter 2 of Part Eleven.
>
> (3) The alienation of State Land shall take effect upon the registration of a register document of title there to pursuant to the provisions referred to sub-section (1) or (2), as the case may be; and, **notwith standing that its alienation has been approved by the State Authority, the land shall remain State land until that time.** (emphasis added)

[4] The following cases were relied upon by learned counsel for the contributory, *North East Plantations Sdn Bhd lwn. Pentadbir Tanah Daerah Dungun & Satu Lagi* [2011] 4 CLJ 729, *Dr. Ti Teow Siew & Ors v. Pendaftar Geran-Geran Tanah Negeri Selangor* [1981] CLJ 134; [1981] CLJ (Rep) 142, *Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd* [1987] 2 CLJ 290; [1987] CLJ (Rep)161, *Pembinaan Batu Jaya Sdn Bhd v. Pengarah Tanah Dan Galian Selangor & Anor* [2013] 10 CLJ 570, *Pembinaan Batu Jaya Sdn Bhd v. Pengarah Tanah Dan Galian, Selangor & Anor* [2016] 5 CLJ 520.

[5] The contributory also relied on the grounds of judgment of the learned judge in *Antero Harapan Sdn Bhd v. Restu Teguh Sdn Bhd supra*. This was the liquidator's application in encl. 60 to seek directions of the court as to whether he could accept the advance from the petitioner to acquire the said land and sell it to the petitioner for the consideration of RM17.3 million. The contributory contends that the said judgment supports their case that the respondent had no *locus standi* to sell the said land as the title had not been registered then.

[6] The next point that was raised by the contributory was that the liquidator had committed equitable fraud. He alleges that the said land was sold at an undervalue to the petitioner. The petitioner had previously entered into a sales and purchase agreement with the respondent to sell the said land. The selling price of the said land was RM34,000,000. A valuation report by JS Valuers Property Consultants produced by the contributory. The report places the value of the said land at RM43,000,000 on a commercial basis and RM24,000,000 on a residential basis.

[7] It was further submitted by the contributory that the said land was alienated as commercial land and not residential. To support this contention the contributory referred to three letters dated 16 May 2016, 28 June 2016 and 22 July 2016 from the State Authorities. These correspondences states the said land was alienated for commercial purposes.

[8] Lastly it was contended that the petitioner and the liquidator had on 12 May 2017 effected transferred and registered the said land in favour of the petitioner with the intention of defeating the application in encl. 86. The relevant documents had been served on the petitioner and respondent by 6 May 2016. The contributor alleges *mala fide* and unconscionable conduct on the part of the petitioner and the respondent. The contributory cited the case of *Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd* [2001] 4 CLJ 549 to further their point that the conduct of the respondent and petitioner amounted to a contempt of court.

The Petitioner And Respondent's Case

[9] Since the arguments of the petitioner and the respondent were based on substantially the same facts, and both are resisting this application, their arguments are taken together.

[10] The petitioner and the respondent both naturally refute the fact that the agreement entered between them was void in the light of s. 78(3) of the NLC.

[11] It was further argued that in any event, the agreement entered between them was conditional or subject to the issuance of a certificate of title to the said land as well as procurement of the State's consent of the transfer of the said land to the purchaser who was in this case the petitioner.

[12] Further they strenuously argued that the said land was sold at a fair market price. In other words, it was not sold at an undervalue as alleged by the contributory. With regard to the petitioners earlier offer of RM34,000,000 in 2013, the petitioner asserts that the said land was purchased at the material time with the intention that it be utilised for "Commercial and Housing Scheme "and not solely for residential. They argue that their intentions were noble and emphasised that the said land had been sold in compliance with the consent judgment.

[13] As for the use of the said land they insist that the said land was alienated for residential use only. The said land was not to be utilised for commercial purposes. This was evident from a letter dated 26 October 2016 from the State Authority where the title stated that the said land was for "skim perumahan" or residential scheme.

[14] The respondent refuted any form of impropriety in the transfer and registration of the said land in favour of the petitioner. This was because the petitioner had paid the full purchase price. Accordingly, the respondent's solicitors had, on 18 April 2017, forwarded all the relevant documents including the memorandum of transfer and the consent to transfer to the petitioner's solicitor. This was before the contributor had filed this application herein.

[15] The respondent and petitioner further stated that they were merely complying with the court order dated 24 October 2016 in completing the sale. In any event it was contended by them that the caveat which was lodged on 12 January 2017 was removed by a court order dated 6 April 2017. This paved the way for the completion of the sale of the said land to the petitioner. The respondent stressed that there was no appeal by the contributory from this court order.

The Issues To Be Considered

[16] From the facts presented in the affidavits filed by both parties pursuant to this action as well as submissions made, this court is of the view that the overriding issues to be determined are whether:

(a) the agreement dated 21 November 2016 was valid in the light of s. 78(3) of the NLC;

(b) the said land was alienated with the condition that it was to be utilised for residential or commercial purpose.

(c) the liquidator was acting properly and impartially at all material times in dealing with the land.

[17] The last two issues were ventilated during the hearing of the liquidator's application in encl. 60 and there the court found that the alienation was specifically for residential purpose. The court had also made a finding that the liquidators had acted impartially in the sale of the said land and that there was no necessity in appointing a committee of inspection with regard to the sale of the said land. This court will however relook at this matter in the light of post encl. 60 events and other matter which arose during the hearing of this application.

Analysis Of The Facts

The First Issue

[18] Dealing primarily with the first issue, this court has no doubt the cases relied upon by the contributory reflected the correct position in law as regards to the interpretation of s. 78(3) of the NLC. The said provision clearly state that alienation can only take place upon registration of a register document of title. This is the position notwithstanding that its alienation has been approved by the State Authority, "the land shall remain State land until that time". In short approval alone does not equate with alienation and title, equitable or otherwise. There must be registration of title in accordance with the NLC. From the reading of s. 78(3) of the NLC, it's rationale is to ensure that notwithstanding prior approval by the State Authority the alienation process is only completed when final registration takes place in accordance with s. 78(1) or (2) of the NLC. Thus, the scope of s. 78(3) NLC is wide enough to cater for any eventualities that may take place between the time of the approval to the time of registration of the title.

[19] To further elaborate on this point and taking as an example the case of *North East Plantations Sdn Bhd lwn. Pentadbir Tanah Daerah Dungun & Satu Lagi, supra*, the issue in contention was the State Authority refusing to accept the premium to be paid for eight out of 11 lots of land. Prior to this three lots of land were issued with documents of title upon the appellant paying the premium. The State Authority had decided to revoke the alienation of the remaining eight lots because there was a change of government in the state. Relying on s. 78(3) NLC the Federal Court held that since the eight titles had not been registered the State Authority were well within their rights to revoke the approvals for the eight lots.

[20] The power of the State Authority to revoke an approval for alienation is however not absolute as in the sense that it is a prerogative of the state. As such it is therefore open to judicial scrutiny. This was stated clearly in the case of *Pembinaan Batu Jaya Sdn Bhd v. Pengarah Tanah Dan Galian, Selangor & Anor* [2016] 5 CLJ 250 where His Lordship Abang Iskandar JCA in delivering the judgment of the court stated as follows:

> In the circumstances, it is our considered view that, based on the authorities cited above as well premised upon the relevant statutory provisions as contained in the NLC and the principles on the rule of law, the State Authority (SA) is vested with the power to deal with all State lands and that includes the power to revoke the order of alienation made previously in respect of certain State lands. To that extent, the law is clear. **But we are of the considered view that the power so vested in the SA is not one that is in the nature of a prerogative.** It is a statutory power that confers discretion on the SA, by way of necessary implication, to revoke an order of alienation previously made in respect of a piece of State land.

A That was the view of the majority in the *North East Plantation* case in the Court of Appeal and which view was affirmed by the apex court on appeal by the appellant. **As such, like all discretionary powers, it ought to be exercised judiciously, not with caprice nor arbitrarily.** As to whether the SA as in this case, ought to assign reason or reasons for any revocation of the previously alienated land, that with respect, must depend on the B peculiar facts obtaining in the case before the SA. (emphasis added).

[21] In the present case, counsel for both the petitioner and respondent submitted that there were material differences in the factual matrix between this case and those cited by counsel for the contributory. To begin with, none of the authorities quoted by learned counsel for the contributory was C concerned with the State Authority having entered into a consent judgment with the party to whom the land was to be alienated such as in this present case.

[22] In contrast with those cases too, there was no such revocation of the D alienation as in this case. In the instant case, the State Authority had consented to the said land being transferred to the respondent. This consent manifested itself in the consent judgment recorded in Civil Suit No: 22NCVC-93-09/2014. The full purchase price had been paid within the time frame of the issuance of the Form 5A. Subsequently the documents of title had been issued to the respondent on 28 December 2016.

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[23] As to the significance of the consent order, the Federal Court in *Tan Geok Lan (p) v. La Kuan* [2004] 2 CLJ 301; [2004] 3 MLJ 465 FC stated the following in answering the question as to whether the parties in a civil action in the High Court "are bound by the agreement reached between them on the F mode and manner of determining the issues which are the subject-matter of the proceedings in the trial court". There the Federal Court answered as follows:

On the first issue, which is related to question (1), *a consent judgment or order is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of the court, and its force and effect derives from the contract between the parties leading to, or evidenced by, or incorporated in, the consent judgment or order.* A consent order must be given its full contractual effect, even if it relates to an interlocutory step in the action (see para. 390 @ p. 286, *Halbury's Laws of England*, 4th edn vol. 37). We gather from this proposition that: (i) the agreement on the terms reached between the parties at the interlocutory stage of an action is a contract between the parties; and (ii) the consent judgment or order arising out of that contract is also a contract between the parties except that the latter is superadded by the command of the court. (emphasis added)

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[24] As to the binding effect of the consent judgment the learned editors of *Malaysian Civil Procedure* – 2015 Edition at p. 566 stated: A

> It is trite law that a consent order cannot be varied unless it is with the agreement of the other party or parties affected by it, especially where the consent order was secured with the benefit of legal advice to all parties involved: *Zainudin bin Muhammad v. Atsco Ltd & Anor* [2003] 2 AMR 43; [2003] 1 MLJ 369, CA. It would be a denial of justice to permit a party to resile from what his counsel decided for him merely because he lost: *Visia Finance Bhd v. Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 AMR 1959; [1998] 2 MLJ 705, CA. It has been held that a consent order cannot be challenged on the basis that a party has been wrongly advised by his solicitor: *Dr Kok Chee Min v. Kan Choy Yoong* [1994] 2 AMR 1575; [1994] 3 MLJ 210, HC. B C

[25] After listening to the submissions from all parties this court is agreeable with the contention that the facts of the present case are distinguishable from those depended upon by counsel for the contributory on the issue of s. 78(3) of the NLC. The consent judgment does have a bearing as to the capacity of the liquidator of the respondent company in entering into the agreement as well as to the status of the agreement itself. D

[26] Having said that it is therefore necessary for this court to determine the effect of the consent judgment to the validity of the agreement in the light of s. 78(3) of the NLC. E

[27] In *North East Plantations Sdn Bhd lwn. Pentadbir Tanah Daerah Dungun supra* Alauddin Mohd Sheriff FCJ, in explaining the effect of s. 78(3) of the NLC quoted with approval the case of Rahmah bt Ali (unreported) (Journal Tanah Vol. 1 Bil. 1/1992) where the learned FCJ stated: F

> Di dalam kes *Rahmah bt. Ali* (di atas) mahkamah menyatakan:
>
> Clearly here to say that there was an implied promise to register the land in the plaintiffs' favour is to go against the express provision of section 78(3) (of the National Land Code) itself which seeks to retain the ownership of land in the State until registration takes place. Such a construction of implied promises would mean that the plaintiffs could, since specific performance does not lie against the defendant, by a declaration, ask the Court to pronounce the land to be theirs and indirectly achieve the same result or rendering the statute impotent and of no effect. One could scarcely imagine that was what the Government had in mind at the time when the land was approved. Now could there conceivably then have been an implied promise and in its turn, an intention to contract? A promise must be implied as to be consistent with a statute, not inconsistent with it. I suppose it is in that light that it was once said that a government undertaking, **unless of course, it by deed or under a formal contract, was not enforceable in a Court of law**. (emphasis added). G H I

[28] The learned FCJ echoed the same sentiment when he observed that:

> *Dengan hanya permohonan perayu untuk mendapatkan tanah telah diluluskan ianya tidak bermakna Kerajaan Negeri telah terikat secara kontraktual hingga menyebabkan Kerajaan Negeri tidak boleh lagi membuat keputusan untuk membatalkan kelulusan yang telah diberikan.* Mengikut Perlembagaan Persekutuan (Jadual 9) dan dibawah s. 40 KTN 'tanah' adalah kepunyaan Negeri dan sebagai pemilik tanah ia berhak membuat apa-apa keputusan atau mengambil apa-apa tindakan yang difikirkan wajar dan munasabah. Samada tindakan membatalkan sesuatu kelulusan itu wajar atau tidak merupakan isu yang berasingan dan tidak boleh menidakkan hak Kerajaan Negeri sebagai pemilik tanah. (emphasis added)

[29] Accordingly, what can be discerned from the above passage is that the mere approval of alienation by the State Authority does not mean that the State Authority can be compelled to alienate the said land as though it was contractually bound to do so and to the extent that the State Government cannot revoke the approval.

[30] In this case the consent judgement was in effect a contract between the parties which was superadded by the command of the court. In this respect the liquidator of the respondent had the *locus standi* to enter into the agreement with the petitioner. This in turn gave legitimacy to the agreement itself. This is so despite the fact that registration had not taken place as yet.

[31] Quite apart from the fact that the State Authority had entered into a consent judgement with the respondent the other point raised by the respondent and the petitioner was that the agreement dated 21 November 2016 was a conditional agreement. It was a conditional agreement as it was subjected to certain contingencies before the agreement could take effect. These contingencies included "issuance of the Certificate of Title to the land as well as the procurement of the State Consent for the transfer of the land to the purchaser". The relevant clauses read as follows:

> k. The Vendor has agreed to sell and the Purchaser having inspected the Land has agreed to purchase the Land on an "as-is-where-is" basis free from all encumbrances and with vacant possession **but subject to the expressed and implied conditions of title, to be issued, and upon the terms and conditions hereinafter contained.** (emphasis added)
>
> 1.1 **Subject to the issuance of the Certificate of Title to the Land as well as the procurement of the State Consent for the transfer of the Land to the Purchaser** and in furtherance to the letters of offer from the Purchaser dated 30.5.16, 14.7.16, 15.7.16, 25.7.16, 9.8.16 and 25.10.16 as well as to the acceptance by the Vendor vide its letter of 28.10.16, the Vendor hereby agrees to sell and the Purchaser agrees to purchase the Land free from all encumbrances liens or other adverse claims and with vacant possession thereof on as is where is basis **but**

> **subject to the express and or implied conditions of title, restriction in interest and category of use.** A copy of the letters dated 30.5.16, 14.7.16, 15.7.16, 25.7.16, 9.8.16 and 25.10.16 from the Purchase and Liquidator's letter dated 28.10.16 are annexed collectively hereto as APPENDIX 4. (emphasis added)
>
> 1.3 This Agreement **shall become unconditional on the day the Purchaser's solicitors receive a certified true copy of the State Consent from the Vendor's Solicitors** (hereinafter referred to as "the Unconditional Date"). (emphasis added)

[32] The only interpretation that can be afforded to the clauses above is that the agreement was to have effect only when the conditions mentioned in cl. 1.1 were fulfilled.

[33] It was undisputed that these conditions were fulfilled without any hindrance from the State Authority. A letter from the State Authority dated 16 May 2016 confirmed the approval of alienation as per the terms of the consent judgment. Another letter from the State Authority to the respondent dated 21 February 2017 confirms that the consent to the transfer had been given on 20 February 2017.

[34] From the express term of the agreement, the agreement only became "unconditional" on 20 February 2017 which was well after the alienation was effected upon by the registration of a register document of title in favour of the respondent.

[35] It would be apt there to refer to the case of *Halimah Abdul Rahman v. Fatimah binti Abdullah* [1976] 1 LNS 38; [1976] 2 MLJ 64 at 65 as to the legal implications of a vendor without title in entering into an agreement subject to certain contingencies. There the Federal Court per Ali FJ held that:

> The vendor, Fatimah, in answer to the purchaser's statement of claim pleaded various grounds in support of her contention that the agreement is void … **In paragraph 3 she pleaded that since at the time of the agreement the land was State land she had no locus standi in respect of the land. In other words, the agreement is void because she had no title.** This was argued at the hearing but was not considered by the learned trial judge. In any case **I can see no merit in the argument** in view of what is stated by S.K. Das in his book on the Torrens System in Malaya. On page 358 the learned author wrote:
>
> > … If a vendor having neither a title nor the power to obtain a title contracts to sell land and subsequently before the date fixed for completion he acquires power to call for title the purchaser can force him to complete. The fact that at the date of the contract the vendor had neither title nor power to call for title is of itself no answer to a suit for specific performance by either party: *Brickies v. Shell* [1916] 2 AC 599.

A

> In my view section 33(a) of the Contracts Act, 1950 also answers the question. It provides:
>
> Contingent contracts to do or not to do anything if an uncertain future event happens **cannot be enforced by law unless and until that event has happened** (emphasis added)

B

[36] For completeness, it would also be apt to reiterate what was stated by Suffian LP in the same case:

> I think that the purchaser's claim should have been allowed, **because the sale here was not an outright sale, but a conditional sale, to be completed when the vendor's application is approved by the State.** Just as it is legal for someone to sell rubber which he does not have but which he plans to buy and own on a future date, when it is to be delivered, so it is in my opinion equally legal for someone to sell State land on condition that the deal will be completed if and only if the vendor's application for the land has been successful and the State has issued a Title to him. (emphasis added)

C

D

[37] It is this court's view that the principle stated in *Halimah Abdul Rahman v. Fatimah binti Abdullah, supra,* is applicable in the present case. Pursuant to this, the following propositions can be made in this case, namely that the agreement was a conditional agreement. It was only complete and took effect after the said land had been registered in the name of the respondent by the State Authority. In the upshot the liquidator had *locus standi* to enter into the agreement with the respondent.

E

[38] I feel it appropriate here also to deal with the submission by counsel for contributory that the learned Judicial Commissioner in her grounds concerning the application by the liquidator in encl. 60 had stated that at that material time the said land was not an asset of the respondent company. Learned counsel claimed that the learned Judicial Commissioner had decided that the said land could not be sold as it was not registered in the name of the respondent at the material time.

F

G

[39] This is what the learned Judicial Commissioner said at para. [31] of her grounds of judgment:

> [31] The liquidator thus cannot make any commercial decision with regard to the land, as it is not the asset of the respondent. He cannot perforce hold a tender exercise or public auction of the land as sought by the contributories.

H

I am of the view that to read para. [31] above in its proper context one has to consider also the preceding paragraph, that is para. [30] of the grounds which read as follows:

I

[30] The case illustrates that only upon full payment of the purchase price, equity accords the respondent with all the rights and privileges of a beneficial and legal owner over the land. In the instant case, it is not in dispute that the full purchase price has not been paid. The contention advanced by the contributories that the respondent is the beneficial owner of the land is without foundation. See *Antero Harapan Sdn Bhd v. Restu Teguh Sdn Bhd supra.*

[40] Reading paras. [30] and [31] together, what the learned Judicial Commissioner meant when she said that the "liquidator thus cannot make any commercial decision with regard to the land as it is not the asset of the respondent" was that the said land was not an asset of the respondent at that time as the full purchase price had not been paid to the State Authority. It is evident that the issues in encl. 60 were centred around the payment of the said sums of RM3.5 million and RM596,047 before 27 October 2016 and not the registration of the said land in the name of the respondent. Consequently, I disagree with learned counsel for the contributory that para. [31] of the judgment of the learned Judicial Commissioner conveyed the meaning that the said land could not be sold as it was not registered in the name of the respondent at that time. This same reasoning would be applicable throughout the said judgment where this issue arose.

The Second Issue

[41] I now come to the question as to the use of the said land. Was it alienated for commercial or residential purpose or both? This question was put to rest on the issuance of the document of title on 28 December 2016. This document is exhibited as "exh. TKM 20" in the affidavit of the liquidator in encl. 93. At the heading "Syarat-syarat Nyata" it is expressly stated as "Bangunan Kediaman". Even the contributory's own affidavit (encl. 91) in "exh. HHC 9" document entitled "Cacatan Charian Persendirian" states the land use as "Bangunan Kediaman". Thus, this supports the contention of the liquidator and respondent all along that the said land was alienated for residential purposes only and that their valuation was done on that basis. The condition is also consonant with the terms of the consent judgment entered into on 9 May 2016. I also agree with the findings of the learned Judicial Commissioner in *Antero Harapan Sdn Bhd v. Restu Teguh Sdn Bhd, supra,* on this issue.

The Third Issue

[42] Finally, on the issue as to the allegation that the actions of the liquidator amount to equitable fraud as well as the impartiality of the liquidator. The main trust of this argument was that the land was sold below market price to the detriment of the contributory.

[43] From the background facts it can be seen that contributory had been, at all material times, a party and privy to the terms of the settlement which were incorporated in the consent judgment. His counsel was kept abreast as to the sale and subsequent registration. The valuation done by the valuers Jordan Lee & Jaffar at the request of the respondent valued the said land at RM17,200,000 on the basis that it would be used for residential purposes. The offer of the petitioner was over and above that of the value arrived at by Jordan Lee & Jaffar. There was nothing to show any impropriety in their valuation.

[44] As to the rejection by the liquidator of the sale of the said land to a public listed company, this court finds that the liquidator was only being cautious. The reasoning for the rejection was accepted by the court during the deliberation of this issue in encl. 60. This is what the learned Judicial Commissioner had found as a matter of fact:

> I take first the complaint about a higher offer. It is true that BS Johan Sdn Bhd had offered to purchase the land for RM200,000 more than the petitioner. It is in evidence that the liquidator returned the cheques offered by BS Johan Sdn Bhd on the basis that it is precarious to deal with unknown party as he had not undertaken any tender exercise or public auction with regard to the land as the respondent did not own it. I find the action of the liquidator in returning the cheque does not demonstrate partiality in any way as the liquidator has no power to sell the land to BS Johan Sdn Bhd as the same is not an asset of the respondent. *Antero Harapan Sdn Bhd v. Restu Teguh Sdn Bhd, supra.*

[45] As to the failure of the liquidator's failure to appoint a committee of inspection, this had been extensively dealt with by the learned Judicial Commissioner in *Antero Harapan Sdn Bhd v. Restu Teguh Sdn Bhd, supra,* of which this court adopts. The learned Judicial Commissioner had distinguished the case before her from that of *North Plaza Sdn Bhd v. Equiticorp Holdings Ltd & Ors And Other Appeals* [2013] 3 CLJ 1101. The learned Judicial Commissioner had also found that s. 237(1) of the Companies Act 1965 did not apply in the circumstances. Her reasoning can be found at para. [45] of her grounds of which this court is in full agreement.

[46] Counsel made issue of the fact the petitioner had entered into a sale and purchase agreement in 2013 whereby the petitioner was to purchase the said land for RM34,000,000 from the respondent. What the learned contributory's counsel failed to touch upon was that cl. 1.7 of the sale and purchase agreement expressly stated that the said land was to be developed into a "Commercial and Housing Scheme" as opposed to "Bangunan Kediaman" or residential building. This would explain the higher purchase price stated in the 2013 agreement.

[47] On 26 October 2016 (one day before the dateline for the payment of the balance purchase price and other monies for quit rent and assessment to the State Authority) the solicitors for the liquidators receives a "signed copy" of a valuation report by JS Valuers Property Consultants from the solicitor's for the contributory. By that time, it was already indicated to the liquidators that the State Authority had refused any extension of time for the payment of the purchase price and other payments. The liquidator had the monies at hand from the advances made by the petitioner to make the necessary payments. It would be unreasonable for the liquidator to act on the valuation report in those circumstances. It must be remembered that the petitioner was the only party that had made the advances as no other party, including the contributory, had the capacity to make such advances in furtherance of the purchase price.

[48] This court accepts the explanation by counsel for the respondent that the payments of RM3.5 million and other payments in the sum of RM596,047.00 had to be made by 27 October 2016. The said land would not be transferred to the respondent otherwise and the respondent would have lost the only asset it had. This would not be a loss to the respondent alone but to the other creditors and contributory of the respondent company as well.

[49] It would also be unreasonable for the liquidator not to enter into the agreement on 21 November 2016 as the full purchase price had been paid by the petitioner despite the fact that the contributory being given all the opportunity to do so.

[50] This brings me to the complaint by the contributory of the conduct of the respondent and the petitioner in transferring and registering the said land in favour of the petitioner after having been served with the application in encl. 86. Enclosure 86 included a prayer for the stay of all proceedings and transactions regarding the said land till the outcome of the said application.

[51] The contributory had, apart from the case of *Jasa Keramat supra* also referred to the cases of *Syarikat Syed Kechik Holdings Sdn Bhd & Ors v. Syed Gamal Syed Kechik Al-Bukhary* [2013] 8 MLJ 720, *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849; [2012] 3 MLJ 458 in pressing their point that the liquidator has interfered in the due administration of justice.

[52] Upon perusal of the cases cited by learned counsel for the contributory I am inclined to agree with counsel for the respondent that the liquidator was merely complying with the court order dated 24 October 2016 in securing the said land and selling it. In this respect, this present case can be distinguished from those cases cited by the contributory. The court had

granted the liquidator's application for directions and was thus merely following the direction given by the court as the State Authority had refused the extension of time. The propriety or correctness of the liquidator's and petitioner's conduct is further exemplified by the contributory not having appealed against the said order.

[53] Concerning the respondent's application to remove the caveat in Originating Summons No: AA-24NCVC-56-02-2017. I am of the view that the contributory did not timeously file proceeding in court to sustain the said caveat from the time it was lodged on 13 January 2017, to the time it was removed on 6 April 2017, which was approximately three months. Nothing was done in the form court proceedings during that time despite strong allegations of *mala fide* conduct on the part of the liquidator in the contributory's statutory declaration made for the purpose of lodging the caveat. This inaction on the part of the contributory leaves serious doubts as to the intention of the contributory in bringing this action.

[54] In this respect, it is this court's view that "the purpose of a private caveat is to preserve the *status quo* pending the taking of timeous steps by the applicant to enforce his claim to an interest in the land by proceedings in the courts". See *Registrar Of Titles, Johore v. Temenggong Securities Ltd* [1976] 1 LNS 135 (Privy Council) per Lord Diplock.

[55] Among the reasons stated in the statutory declaration for the lodgement of the caveat was that the contributor had found a purchaser supposedly willing to buy the said land for RM18,000,000 of which it was alleged the liquidator was unreasonable not to accept. This fact was brought up for the first time in the statutory declaration which to my mind was an afterthought. The statutory declaration is exhibited in the liquidator's affidavit in support in Originating Summons No: AA-24NCVC-56-02-2017.

[56] Applying the *dictum* in *Jasa Keramat, supra,* that whether "an act amounts to an interference with the due administration of justice or the course of justice and therefore contempt, or not, depends on the circumstances of each case", this court finds that from the facts of this case neither the respondent nor the petitioner were in contempt or interfered with the due administration of justice in their conduct.

Conclusion

[57] For reasons stated above, this court is of the opinion that the liquidator had the *locus standi* to enter into the agreement. The liquidator was well within his powers under s. 236 of the Companies Act 1965 in the exercise of his duties regarding the sale of the said land.

[58] I therefore dismiss this application. Cost to the respondent and petitioner at RM6,000 respectively.